



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION**  
**ELECTION PETITION APPEAL NO.113 OF 2017**

**FREDRICK ODHIAMBO OYUGI.....APPELLANT**

**VERSUS**

**ORANGE DEMOCRATIC MOVEMENT (ODM).....1<sup>ST</sup>RESPONDENT**

**JANE WANGUI.....2<sup>ND</sup>RESPONDENT**

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....3<sup>RD</sup>RESPONDENT**

**JUDGMENT**

The Appellant, Fredrick Odhiambo Oyugi lodged a complaint before the 3<sup>rd</sup> Respondent's Nomination Resolution Committee seeking to overturn the nomination of the 2<sup>nd</sup> Respondent as the duly appointed nominee of the 1<sup>st</sup> Respondent party in respect of Embakasi North Constituency National Assembly seat. The Appellant complained that he had been declared the winner in the nomination exercise that had earlier been held by the 1<sup>st</sup> Respondent. He was issued with a provisional and a final certificate. The Appellant was surprised when he learnt that the 1<sup>st</sup> Respondent had forwarded the name of the 2<sup>nd</sup> Respondent to the 3<sup>rd</sup> Respondent as its nominee for the said constituency seat instead of him. The Appellant contended that his legitimate expectation to be the nominee of the 1<sup>st</sup> Respondent in respect of the said National Assembly seat was violated and in the circumstances he asked the said Committee to revoke the final nomination certificate issued to the 2<sup>nd</sup> Respondent and instead declare him to be the sole nominee for the 1<sup>st</sup> Respondent political party. In the grounds in support of the complaint, the Appellant alleged that he secured the most votes in the primary nomination exercise that the 1<sup>st</sup> Respondent held on 30<sup>th</sup> April 2017. He was declared the winner by the returning officer. He therefore faulted the 1<sup>st</sup> Respondent for submitting the name of the 2<sup>nd</sup> Respondent to the 3<sup>rd</sup> Respondent without taking into consideration the will of the members of the 1<sup>st</sup> Respondent political party in Embakasi North Constituency.

In its decision rendered on 9<sup>th</sup> June 2017, the 3<sup>rd</sup> Respondent's Nomination Dispute Resolution Committee held thus:

***“The party, failed to manage its nomination process with effect that two nominees presented themselves before the Returning Officer. The Returning Officer acted within the law in declining to nominate the complainant. In any event, this is a dispute that should have been resolved by the Political Parties Dispute Resolution Tribunal. The complaint is hereby dismissed*”**

***with no orders as to costs.”***

The Appellant was aggrieved by this decision and duly filed an appeal to this court. In the memorandum of appeal, the Appellant stated that the Committee erred in failing to consider the evidence that was presented before it which, in his view, confirmed that the Appellant had indeed won during the primaries held by the 1<sup>st</sup> Respondent to nominate its candidate for the said Embakasi North Constituency National Assembly seat. The Appellant was aggrieved that the Committee had affirmed the decision of the returning officer by declining to nominate the Appellant herein despite of the credible evidence that was provided. The Appellant was aggrieved that the Committee upheld the decision of the 1<sup>st</sup> Respondent to nominate the 2<sup>nd</sup> Respondent while the actual nominee was the Appellant. The Appellant faulted the Committee for upholding the 1<sup>st</sup> Respondent's nomination of the 2<sup>nd</sup> Respondent, which in his view, contravened his right to legitimate expectation, rules of natural justice, right to fair administrative action and was in breach of rules of procedure, was illegal and irrational. The Appellant urged the court to allow the appeal, set aside that decision and substitute it by a decision of this court declaring him to be the lawful nominee of the 1<sup>st</sup> Respondent party for the said National Assembly seat for Embakasi North Constituency.

During the hearing of the appeal, this court heard submission made by Ms. Awuor for the Appellant. She reiterated the contents of the memorandum of appeal and urged the court to find that the Appellant was the actual nominee of the 1<sup>st</sup> Respondent party, and, in the circumstances, he should be recognized as such by having his name gazetted by the 3<sup>rd</sup> Respondent as the nominee for the said National Assembly seat. Ms. Mochama for the 2<sup>nd</sup> Respondent did not make any submission in opposition to the appeal because she told the court that she needed time to get further instructions from her client as she had not been sufficiently instructed. Mr. Owuor for the 1<sup>st</sup> Respondent, similarly too, told the court that he needed time to get further instructions from his clients in respect of who, between the two, was the real nominee for the 1<sup>st</sup> Respondent party. On the merits, he submitted that the court should not upset the nomination of the 2<sup>nd</sup> Respondent, and if it did, it should allow the party to nominate its candidate for the said Parliamentary seat.

This court was allocated this appeal on 20<sup>th</sup> June 2017. The court issued directions to the Deputy Registrar to notify the Appellant to serve the Respondents on the said 20<sup>th</sup> June 2017 so that the appeal could be heard by this court at 9.00 a.m. on 21<sup>st</sup> June 2017. During the morning session, learned counsel for the parties appeared before the court. A Mr. Kiragu appearing for the 2<sup>nd</sup> Respondent told the court that he needed time to get further instructions from his client. Ms. Momanyi for the 1<sup>st</sup> Respondent made a similar application. The court impressed upon the parties of the strict timelines that the court was required to hear and determine the present appeal. In that regard, the decision in **Ferdinand Waititu –vs- Independent Electoral and Boundaries Commission (IEBC) & Others Civil Appeal No.137 of 2013** is instructive. The court held in regard to timelines set for settlements of electoral disputes:

***“These timelines set by the Constitution and the Elections Act are neither negotiable nor can they be extended by any court for whatever reason. It is indeed the tyranny of time, if we may call it so. That means that a trial court must manage the allocated time very well so as to complete a hearing and determine an election petition timeously...”***

While these sentiments related to election petitions, it equally applies to resolution of other election disputes because of the strict timelines set by the law. It was in that regard that the court directed counsel for the parties to be ready for the hearing of the appeal at 2.30 p.m. Again at 2.30 p.m. Ms. Mochama Advocate for the 2<sup>nd</sup> Respondent and Mr. Owuor for the 1<sup>st</sup> Respondent informed the court that they were not ready to proceed with the appeal since they had not obtained adequate instructions from their client. In view of the sentiments expressed by the court in the morning, this court declined to grant further adjournment and ordered the hearing of the appeal to proceed as earlier directed. It was on that basis that the appeal was heard.

There is one issue that will determine this appeal and that issue relates to the jurisdiction of the 3<sup>rd</sup> Respondent's Nomination Dispute Resolution Committee to determine the complaint that was lodged before it by the Appellant. The 3<sup>rd</sup> Respondent was acting under the jurisdiction granted to it under **Article 88(4)(e) of the Constitution** which grants the 3<sup>rd</sup> Respondent responsibility, including:

***“the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declarations of election results.”***

**Section 40 of the Political Parties Act** grants the Political Parties Disputes Tribunal jurisdiction to, *inter alia*, determine disputes arising from party primaries. The Committee ruled that the Appellant should have presented his complaint before the Political Parties Disputes Tribunal. Indeed, from the record of appeal lodged by the Appellant, he had lodged a complaint before the Political Parties Disputes Tribunal on 24<sup>th</sup> May 2017. That complaint was registered as **Complaint No.302 of 2017**. In the complaint, the Appellant raised more or less the same issues that he presented before the 3<sup>rd</sup> Respondent's Nomination Dispute Resolution Committee. However, the Appellant withdrew the complaint on 31<sup>st</sup> May 2017 after he made a decision to challenge the decision regarding his nomination before the High Court in **Nairobi High Court Miscellaneous Application No.272 of 2017**. This was a judicial review application. The Appellant was granted leave to file judicial review application which he did on 5<sup>th</sup> June 2017. It is not clear from the record if this application has been heard. Suffice for this court to state is that when the 3<sup>rd</sup> Respondent established the Committee to hear disputes arising out of the submission of nominations made to it by various nominees nominated by political parties and those offering their candidature as independents, the Appellant abandoned his case before the High Court and presented the complaint that is the subject of this appeal to the said Committee.

On re-evaluation of the facts of this appeal, this court cannot fault the decision of the 3<sup>rd</sup> Respondent's Nomination Disputes Resolution Committee in declining to find favour in the complaint lodged by the Appellant lodged before it. It was clear to this court that the dispute between the Appellant and the 1<sup>st</sup> and 2<sup>nd</sup> Respondents arose out of the conduct of party primaries. The Appellant should have presented his complaint before the Political Parties Disputes Tribunal. The Appellant knew this hence his decision to file the complaint before the said Tribunal. The Appellant chose to withdraw the said complaint and instead mounted a judicial review application before the High Court. This court therefore holds that the 3<sup>rd</sup> Respondent's Nomination Disputes Resolution Committee did not have jurisdiction to hear a dispute arising out of nomination of candidates by political parties. The fact that it appeared that the 1<sup>st</sup> Respondent had issued two nomination certificates to two nominees is an issue that should have been resolved either by the 1<sup>st</sup> Respondent's Internal Disputes Resolution Mechanism or by the Political Parties Disputes Tribunal exercising its jurisdiction under **Section 40 of the Political Parties Act**. The Appellant was aware that the 1<sup>st</sup> Respondent had issued a nomination certificate to the 2<sup>nd</sup> Respondent yet he failed to act with diligence and dispatch to prosecute his complaint before the proper forum within the strict timelines stipulated by the law. The Appellant went to the wrong forum to seek the resolution of his complaint.

In the premises therefore, this court holds that the 3<sup>rd</sup> Respondent's Nomination Disputes Resolution Committee did not err when it rendered the decision that it did. The appeal herein is dismissed but with no orders as to costs. It is so ordered.

**DATED AT NAIROBI THIS 22<sup>ND</sup> DAY OF JUNE 2017**

**L. KIMARU**

**JUDGE**